SUPREME COURT, U.S.
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No. 03-929

In the

Supreme Court of the United States

JOHN A. RAPANOS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT

I. THERE IS A CLEAR SPLIT BETWEEN THE SIXTH CIRCUIT IN THIS CASE AND THE FIFTH CIRCUIT COURT OF APPEALS 2

II. THE SIXTH CIRCUIT FAILED TO PROPERLY APPLY *SWANCC* ON REMAND 3

III. THE WETLANDS ON MR. RAPANOS' PROPERTY DO NOT ABUT A TRADITIONAL NAVIGABLE WATERWAY 4

IV. RESPONDENT'S INTERPRETATION OF THE CWA IS INSUPPORTABLE FACTUALLY, LEGALLY, AND LOGICALLY 6

V. THE DECISION BELOW RAISES THE SAME SERIOUS CONSTITUTIONAL QUESTIONS AS THE "MIGRATORY BIRD RULE" INVALIDATED IN *SWANCC* 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

Cases

Deaton v. United States
(Docket No. 03-701) 1

In Re Needham,
354 F.3d 340 (5th Cir. 2003) 2-3, 5

Newdunn v. United States
(Docket No. 03-637) 1

Rewis v. United States,
401 U.S. 808 (1971) 3

Rice v. Harken Exploration Co.,
250 F.3d 264 (5th Cir. 2001) 2-3

Solid Waste Agency of Northern Cook County (SWANCC) v. United States Army Corp of Engineers,
531 U.S. 159 (2001) ..... passim

United States v. Riverside Bayview Homes, Inc.,
474 U.S. 121 (1985) 4

United States v. Universal C.I.T. Credit Corp.,
344 U.S. 218 (1952) 9

Statutes

33 U.S.C. § 1319 8

Miscellaneous

Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction,
General Accounting Office Report, GAO-04-297
(Feb 27, 2004) 1

INTRODUCTION

Few petitions provide more compelling reasons for review than this case: (1) In the context of a criminal conviction this case raises an important federal question about the scope of the Clean Water Act (CWA); (2) the Sixth Circuit decision below is in clear conflict with the Fifth Circuit; and, (3) the Court of Appeal's interpretation of the CWA conflicts with this Court's landmark case of *Solid Waste Agency of Northern Cook County (SWANCC) v. United States Army Corp of Engineers*, 531 U.S. 159 (2001), and raises serious constitutional questions.

Moreover, two other pending petitions raise nearly identical questions to this case—whether the federal government may regulate wetlands under the CWA that do not abut a body of open water but instead lie miles away from the nearest navigable waterway. *See Newdunn v. United States* (Docket No. 03-637) and *Deaton v. United States* (Docket No. 03-701). More than fifteen amicus briefs were filed in support of these petitions representing a score of state, local, and private entities and thousands of constituents across the country. Under the CWA, the federal government claims authority over millions of acres of remote wetlands and other waters in every state in the Nation. In effect, the government wields a federal veto power over local land and water use in contravention of the intent of Congress, this Court's precedent, and established principles of federalism.

Review in this case is also underscored by a recent General Accounting Office report documenting the Corps' inconsistent (if not arbitrary) jurisdictional determinations that follow from a lack of clear guidance on the scope of the CWA. *See Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction*, GAO-04-297 (Feb 27, 2004); *See also* the Supplemental Brief for Petitioners in *Newdunn v. United States* (0-3637)

ARGUMENT

I

THERE IS A CLEAR SPLIT BETWEEN THE SIXTH CIRCUIT IN THIS CASE AND THE FIFTH CIRCUIT COURT OF APPEALS

Respondent United States claims that there is no "square conflict" between this case and the Fifth Circuit decisions in *Rice v. Harken Exploration Co.*, 250 F.3d 264, 269 (5th Cir. 2001) and *In Re Needham*, 354 F.3d 340 (5th Cir. 2003). Opposition to Petition for Writ of Certiorari (Opp.) at 18-22. But that is wishful thinking. Although those cases involved the Oil Pollution Act (OPA), the court found that the definition of "navigable waters" in that statute was co-extensive with the definition of "navigable waters" in the CWA. Thus, the court relied on this Court's decision in *SWANCC* to determine the scope of jurisdictional waters under both acts.

In *Needham*, the Fifth Circuit expressly rejected the holding of the Sixth Circuit in this case. The Fifth Circuit began by questioning the government's definition that jurisdictional waters under the CWA included all waters that have a hydrological connection with "navigable waters." Citing the Sixth Circuit decision in this case with disapproval for agreeing with the government's "expansive interpretation," the Fifth Circuit stated in unequivocal terms : "In our view this definition is unsustainable under *SWANCC*." And further, "[t]he CWA and the OPA are not so broad as to permit the federal government to impose regulations over 'tributaries' that are neither themselves navigable nor truly adjacent to navigable waters." *In Re Needham*, 354 F.3d at 345.

So that there would be no doubt about the law of the Fifth Circuit, and to clearly distinguish it from the law of the Sixth Circuit, the court stated:

> Consequently, *in this circuit* the United States may not simply impose regulations over puddles, sewers, roadside ditches and the like; under *SWANCC* "a body of water is subject to regulation . . . if the body of water is actually navigable or adjacent to an open body of navigable water."

Id. at 345-46 (emphasis added), (citing *Rice v. Harken Exploration Co.*, 250 F.3d at 269).

II

THE SIXTH CIRCUIT FAILED TO PROPERLY APPLY *SWANCC* ON REMAND

In 2001, this Court granted Mr. Rapanos' petition for writ of certiorari, vacated Mr. Rapanos' conviction of filling wetlands without a permit, and remanded the case to the Sixth Circuit for consideration in light of *SWANCC*. In *SWANCC*, this Court determined that the CWA was intended to cover traditional navigable waters and some wetlands that abut and are inseparably bound up with such waters. *See SWANCC*, 531 U.S. at 172. This Court declined the government's invitation to extend the CWA to more remote waters. *Id.* at 171-72.

However, based on a theory that the CWA encompassed any water with a potential hydrological connection to a traditional navigable water, the Sixth Circuit reinstated Mr. Rapanos' conviction with sanctions, including a fine of $185,000, three years probation, and at least ten months in federal prison. Thus, the Sixth Circuit criminalized conduct that this Court had determined in *SWANCC* was beyond the reach of the CWA. The unique posture of this case, as well as the rule of lenity[1], justifies review by this Court.

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[1] This Court has stated that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis v. United States*, 401 U.S. 808, 812 (1971).

III

THE WETLANDS ON MR. RAPANOS' PROPERTY DO NOT ABUT A TRADITIONAL NAVIGABLE WATERWAY

Respondent takes issue with Petitioner's claim that the district court found that no hydrological connection was ever established between the wetlands on Mr. Rapanos' property and the nearest navigable waterbody. *See* Opp. at n.4. Instead, Respondent implies that the district court simply accepted Respondent's evidence of a hydrological connection. But this is incorrect. According to the trial court, the government did introduced evidence "supporting its position that the wetlands on Defendant's property were connected to navigable waters." But the court concluded: "That fact, however, was never explicitly found, either by the jury or by this Court, nor was such a finding necessitated by the jury instructions." Pet. Appendix B6. Although the Court of Appeals "decided this case based on the determination that such a connection exists," Opp. at 17, that "determination" was not made by the trier of fact and the Court of Appeals did not find that the trial court had erred. Rather, the Court of Appeals assumed the connection existed and upheld the conviction. But in either case, with or without a hydrological connection, the government does not have authority under the CWA to regulate wetlands, like those on Mr. Rapanos' property, that do not physically abut a traditional navigable water.

In *SWANCC*, this Court stated it had allowed regulation of wetlands abutting a traditional navigable waterway in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), because the wetlands in that case were "inseparably bound up with the 'waters' of the United States." *SWANCC*, 531 U.S. at 167. According to this Court, "[i]t was the significant nexus between the wetlands and "navigable waters" that informed [its] reading of the CWA in *Riverside Bayview Homes*." *Id.* But no

such showing has been made in this case. The wetlands on Mr. Rapanos' property purportedly lie near a drainage ditch and do not abut a traditional "navigable water" as did the wetlands in *Riverside Bayview Homes*. Nor is there a significant nexus with a traditional "navigable water" as existed in that case. To the contrary, the wetlands on Mr. Rapanos' property are exactly like the wetlands about which this Court did not express an opinion in *Riverside Bayview Homes*. "Indeed, we did not 'express any opinion' on the 'question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water . . . .'" *Id.* However, in *SWANCC*, this Court did express an opinion precisely on the question presented in this case: "In order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water. But we conclude that the text of the statute will not allow this."[2] *Id.* at 168.

This conclusion that the statute does not allow federal regulation of waters that are not adjacent to open bodies of navigable waters is based on the limitations inherent in Congress' use of the term "navigable waters." As this Court

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[2] The United States goes to great lengths to undermine this clear statement by suggesting that the term "open water" does not mean only traditional navigable water as the context of the statement would suggest, but implies it could mean any water in the entire tributary system. *See* Opp. at 14-15. Apparently, the government would have us believe that this Court was thinking as much of ditches, culverts, and sewers in its use of the term "open water" as of navigable lakes and rivers. It is also noteworthy that the Fifth Circuit in *In Re Needham* equates the term "open water" with navigable waters, thus broadening the conflict between this case and the Fifth Circuit: "[U]nder *SWANCC* 'a body of water is subject to regulation . . . if the body of water is actually navigable or adjacent to an *open body of navigable water*.' " *In Re Needham* 354 F.3d at 345-46 (emphasis added).

observed, the term 'navigable' shows us that Congress enacted the CWA based on its "traditional jurisdiction" over navigable waters. *See SWANCC*, 531 U.S. at 172. Therefore, Respondent's contention that its expansive interpretation of the CWA is "faithful to this Court's holding in *SWANCC*" is without merit. Opp. at 23.

IV

RESPONDENT'S INTERPRETATION OF THE CWA IS INSUPPORTABLE FACTUALLY, LEGALLY, AND LOGICALLY

Respondent argues that if Congress can protect *some* nonnavigable, intrastate waters (including wetlands), "based on the danger that discharges into those waters may impair the quality of traditional navigable waters downstream," then there is no reason to limit Congress' constitutional authority over such waters regardless of the distance or number of surface water "links" between the regulated discharge and the nearest traditional navigable water. Opp. at 24-25.

This position is faulty for a number of reasons. First, reliance on the term "may impair" would allow the government to regulate any water with a mere hypothetical connection to navigable water. Moreover, Respondent concedes that not every discharge of fill material into a wetland will have "deleterious effects on the quality of traditional navigable waters." Opp. at 13. In fact, such is the case here. But we are told that doesn't matter because the government may allow development of the wetland for other uses simply by issuing a permit. Opp. at 13. But this invidious argument misses the point. The question here is not whether Mr. Rapanos can get a section 404 permit based on the largess of the government, but whether the government has authority to regulate the wetlands on Mr. Rapanos' property at all.

Second, this Court's allowance for federal regulation of some wetlands "that do not themselves satisfy traditional standards of navigability" was based on the interconnectedness of those wetlands with an abutting navigable water and not merely on the risk of impairment to navigable waters somewhere downstream:

> We found that Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands 'inseparably bound up with the 'waters' of the United States.' It was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*.

SWANCC, 531 U.S. at 167.

This narrow exception to this Court's conclusion that Congress intended to limit the reach of the CWA to traditional navigable waters, as evidenced by Congress' repeated use of the term "navigable," does not translate into wholesale authority to regulate any water hydrologically connected to a navigable water. That would allow the exception to swallow the rule and would read navigability right out of the Act. As this Court warned, "such a ruling would assume that 'the use of the word navigable in the statute . . . does not have any independent significance.'" *Id.* at 172.

Respondent's premise that the federal government can (and must) regulate all upstream waters to protect the navigable waters downstream is not supported by either the text of the CWA or this Court's decision in *SWANCC*. Moreover, such a broad regulatory reach is not necessary to effect the purposes of the Act. The CWA is designed to protect navigable waters by regulating navigable waters. It does not and need not authorize the regulation of any water that may connect to a navigable water. Under the CWA, any actual discharge to a traditional navigable water without a permit is a violation of the Act and

punishable by substantial civil and criminal penalties. *See* 33 U.S.C. § 1319. These penalties serve as a significant deterrent to such discharges .

And third, Respondent's position that the distance and number of "links" between the regulated discharge and the nearest traditional navigable water should have no bearing on the reach of federal jurisdiction under the CWA is illogical. It is a matter of common sense that the discharge to a remote wetland with a tenuous hydrological connection to other waters is likely to have little or no effect on navigable waters downstream, thus obviating the need for wholesale regulation of such wetlands. In addition, Respondent seems to be laboring under a misapprehension that the scope of the CWA is limited only by the reach of the Constitution and not the language of the Act itself. The government made the same mistake in *SWANCC*, arguing that Congress intended the CWA to be enforced to the limits of Congress' Commerce Clause authority. But this Court dispelled that notion in a footnote.

> Respondents refer us to portions of the legislative history that they believe indicate Congress' intent to expand the definition of "navigable waters." Although the Conference Report includes the statement that the conferees "intend that the term 'navigable waters' be given the broadest possible constitutional interpretation," S. Conf. rep. No. 92-1236, p.144 (1972), neither this, nor anything else in the legislative history to which respondents point, signifies that Congress intended to exert anything more than its commerce power over navigation.

SWANCC, 531 U.S. at 168 n.3.

V

THE DECISION BELOW RAISES THE SAME SERIOUS CONSTITUTIONAL QUESTIONS AS THE "MIGRATORY BIRD RULE" INVALIDATED IN *SWANCC*

Respondent claims the decision below does not raise a constitutional conflict. But the government fails to find support in *SWANCC* for this proposition. In *SWANCC* this Court indicated that the "Migratory Bird Rule" invoked the outer limits of Congress' commerce power: (1) because it was unclear whether the government could establish a "substantial effect" on interstate commerce by reference to intrastate activities, like the filling of ponds or wetlands; and (2) because the imposition of federal jurisdiction over such things as ponds and mudflats "would result in a significant impingement of the State's traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 173-74. Unfortunately, the decision below authorizes the regulation of any waters with an actual or perceived hydrological connection to a traditional navigable water. This extends federal authority under the CWA virtually as far as the "Migratory Bird Rule." It certainly raises the same serious constitutional questions about the aggregation of intrastate activities and federal encroachment on traditional state power that vexed this Court in *SWANCC*.

In such cases, this Court requires that Congress give "a clear indication that Congress intended that result." *Id.* at 172. This is particularly true when the statute involves criminal sanctions, such as the Act in this case. "[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952).

Interestingly, Respondent has ignored this requirement of a "clear indication" of congressional intent. Perhaps because it must. Congress has given no indication that it intended to push the limits of its commerce power and alter the federal-state framework by treading on traditional state powers. To the contrary, in the CWA "Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of the States . . . to plan the development and use . . . of land and water resources . . . .'" *SWANCC*, 531 U.S. at 174 (citing 33 U.S.C. § 1251(b)).

CONCLUSION

This case raises an important federal question about CWA jurisdiction in the context of a criminal conviction. It also conflicts with the Fifth Circuit and this Court's *SWANCC* decision on which the remand was based. In addition, this case raises the same serious constitutional questions which resulted in the invalidation of the "Migratory Bird Rule."

For these reasons, this Court should grant Mr. Rapanos' petition for writ of certiorari.

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Respectfully submitted,

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